

UK WITHDRAWAL FROM THE EUROPEAN UNION (CONTINUITY) (SCOTLAND) ACT 2021

EXPLANATORY NOTES

OVERVIEW AND BACKGROUND

3. This Act provides for:
- the introduction of a power to enable Scottish Ministers to continue to keep devolved law in line with EU law so far as appropriate following the end of the implementation period provided for in the European Union (Withdrawal Agreement) Act 2020, which was when, under that Act, EU law ceased to apply in the United Kingdom as a consequence of the UK's withdrawal from the EU;
 - the introduction of the guiding principles on the environment into Scots law; and
 - the formation of Environmental Standards Scotland, and its functions and powers.

Background

4. On 1 January 1973 the UK joined the European Economic Community, now the European Union. The principal statute which gave domestic effect to EU law and gave the governments of the UK the ability to implement EU law was the European Communities Act 1972 (the "ECA").
5. On 23 June 2016, a referendum was held in the UK and Gibraltar on the question whether the UK should remain a member state of the EU. Across the UK and Gibraltar 52% of the votes were for leaving the EU, with 48% voting to remain. In Scotland, 62% of the votes were for remaining in the EU, with 38% voting to leave.
6. On 29 March 2017, the Prime Minister notified the European Council of the UK's intention to withdraw from the EU under the terms of Article 50 of the Treaty on the European Union ("the TEU") and section 1 of the European Union (Notification of Withdrawal) Act 2017. The EU (Withdrawal) Act 2018 ("EUWA") was passed on 26 June 2018 and repeals the ECA and establishes a new framework for the application of former EU law within the UK, known as 'retained EU law'. This new form of domestic law is established under the EUWA by taking a snapshot of EU law as it stands at the moment of EU exit and converting that into domestic law, as well as preserving laws made in the UK to implement EU obligations.
7. The EUWA also provides temporary powers to make secondary legislation to enable corrections to be made to these 'converted' and 'preserved' laws to ensure they continue to operate appropriately now that the UK is no longer a member state. These powers are sometimes referred to as 'deficiency' powers.
8. The European Union (Withdrawal Agreement) Act 2020 ("the 2020 Act") was passed on 23 January 2020 and gives effect to the Withdrawal Agreement that was agreed by the EU and the UK in October 2019. The Withdrawal Agreement was accordingly ratified and the United Kingdom exited the European Union on 31 January 2020 ("exit day").

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9. The Withdrawal Agreement provided for a transition period to apply from exit day until 31 December 2020. The transition period is also referred to as the implementation period. Whilst there was scope under the Withdrawal Agreement to extend the implementation period, this was ruled out under section 15A of the EUWA. During the implementation period, the vast majority of EU law continued to apply in the UK as though it were still a member state.
10. Therefore, despite the repeal of the ECA on exit day by the EUWA, the 2020 Act makes amendments to the EUWA to save and modify the effect of that repeal and to give effect to the continuation of EU law during the implementation period as per the Withdrawal Agreement. Directly applicable EU measures therefore continued to apply directly in the UK during this period and the UK continued to be required to implement EU obligations.
11. The 2020 Act also amends the EUWA to ensure that the snapshot of retained EU law was taken at the end of the implementation period (referred to in the EUWA, as amended by the 2020 Act, as “IP completion day”) as opposed to on exit day.¹ It follows therefore that EU law as it stood in Scotland on IP completion day became part of Scots law as retained EU law under the EUWA.
12. Retained EU law, as modified under deficiency powers so that it operates appropriately, will continue to apply in Scotland until such time as new domestic laws are made to change it. The extent to which ‘post-implementation period EU law’ will apply in the UK going forward as a matter of the UK’s international obligations, depends on the terms of the future relationship agreements reached between the UK Government and EU and the European Atomic Energy Community on 24 December 2020, including the Trade and Cooperation Agreement, the Civil Nuclear Agreement and the Security of Classified Information Agreement. The European Union (Future Relationship) Act 2020², which received Royal Assent on 30 December 2020, implements elements of these agreements. The extent to which ‘post-implementation period EU law’ will apply in the UK will also depend on any further future agreements concluded by the UK and the EU.

The different forms of EU law and the ECA

13. The EU Treaties are the primary source of EU law and under the Treaties, the EU may adopt a number of different forms of legislation. The most common forms are EU Regulations and EU Directives but other forms include decisions, recommendations and opinions.
14. EU Regulations contain detailed legal rules and have “direct effect” in member states. This means, in principle, they do not need to be specifically implemented domestically and can be applied based on the text of the Regulation itself. Until IP completion day EU Regulations were automatically applied in the UK without the need for specific implementing legislation by virtue of section 2(1) of the ECA.
15. EU Directives set out a legal framework which member states have to follow but which leave discretion to member states about how to make them part of their law. Directives do not generally have direct effect and require to be implemented through domestic law, frequently this was done using the powers provided for this purpose in section 2(2) of the ECA.
16. The EU can also adopt binding decisions. These may be addressed to a particular party or parties (e.g. to individuals or to member states), in which case it may have been

¹ Although, the Direct Payments to Farmers (Legislative Continuity) Act 2020, which the Scottish Parliament consented to on 16 January 2020, converted the EU legislation governing the 2020 Common Agricultural Policy (CAP) direct payment schemes into domestic law at 11 pm on 31 January 2020.

² On 30 December the Scottish Parliament voted to withhold consent to this Bill by 92 votes to 30 as it was Parliament’s view that the future relationship agreements negotiated by the UK Government would cause severe damage to Scotland’s environmental, economic and social interests and insufficient time had been allowed for proper scrutiny in the UK and Scottish Parliaments.

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necessary for domestic legislation to give effect to the decision. It is also possible for a decision to have no addressee. In those circumstances, a decision may or may not have been directly and generally applicable: it would have depended on the context and the particular wording of the decision.

17. The EU institutions can also adopt recommendations and opinions, which are not legally binding although they may have legal effects (e.g. in so far as domestic courts are required to take them into account in interpreting domestic legislation designed to implement them or where they may have legal effects in the interpretation of legally binding instruments).
18. EU tertiary legislation refers to when EU secondary legislation (e.g. EU Regulations and Directives) makes provision for a further power to make detailed tertiary rules to be adopted at EU level. There are two types of tertiary legislation: delegated acts and implementing acts. The power to make a delegated act is a power to supplement or amend non-essential elements of the legislative act whereas implementing acts are used where uniform conditions for implementing legally binding Union acts are needed. Tertiary legislation may take the same form as secondary legislation (i.e. regulations, directives, decisions, recommendations or opinions).
19. As noted above, until IP completion day the ECA was the principal statute which gave domestic effect to the various types of EU law. The two main provisions of the ECA were section 2(1) and section 2(2). The key part of section 2(1) provided that certain rights or obligations created or arising by or under the EU Treaties (i.e. those which are, in EU law, of direct application or direct effect in the member states) applied automatically in the UK without the need for additional implementing legislation.
20. As above, other types of EU law (such as Directives) were implemented through domestic law, frequently using the powers provided for that purpose in section 2(2) ECA. The power in section 2(2)(a) could be used to implement EU obligations and the power in section 2(2)(b) could be used to deal with matters 'arising out of or related to' EU obligations.
21. As a consequence of amendments made to the EUWA by the 2020 Act, section 2(1) of the ECA continued to apply and the powers in section 2(2) remained available during the implementation period but these provisions ceased to apply from IP completion day.

Retained EU law

22. As noted above, the EUWA establishes a new framework of retained EU law and this framework falls into three main categories:
 - (i) EU-derived domestic legislation (e.g. domestic primary or secondary legislation which implements EU obligations);
 - (ii) direct EU legislation (e.g. directly applicable EU legislation which had effect by virtue of section 2(1) of the ECA, such as EU Regulations, EU tertiary legislation and EU decisions);
 - (iii) other directly effective EU law rights and obligations (this captures the remaining rights and obligations not covered by (i) and (ii)).
23. Modifications of retained EU law are also retained EU law as section 6(7) of the EUWA makes clear that "retained EU law" means (i), (ii) and (iii) above including that body of law as it is "added to or otherwise modified by or under" the EUWA or other domestic law from time to time. The effect of section 6(7) of the EUWA, however, is not that all legislative amendments to retained EU law will automatically be included under the retained EU law umbrella: this will ultimately depend on the significance of any such amendment.

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24. Section 7 makes provision about the status of retained EU law and restricts the way in which categories of retained EU law within (ii) and (iii) above may be amended by primary and subordinate legislation. It is clear from section 7 that there are no restrictions on powers contained in future primary legislation.

EU Law and the Scotland Act 1998

25. Section 29(2)(d) of the Scotland Act 1998 provides that Acts of the Scottish Parliament are not law in so far as they are incompatible with EU law. Section 12(1) of the EUWA removed this competence restriction, which means it is competent for the Scottish Parliament and the Scottish Ministers to amend retained EU law in devolved areas, subject to section 30A of the Scotland Act 1998 (inserted by section 12(2) of the EUWA).
26. Section 30A provides a power for a UK Minister to specify in regulations particular areas in which the Scottish Parliament may not modify, or confer powers to modify, retained EU law. Section 30A provides that any restriction applied using the power does not affect the competence of the Scottish Parliament to make any provision that it could have made immediately before IP completion day. As yet, no regulations under section 30A have been made.

Part 1 – Alignment With Eu Law

Section 1– Power to make provision corresponding to EU law

27. Section 1 gives the Scottish Ministers the discretionary power to continue to keep devolved law in line with EU law following ‘IP completion day’.
28. The reference to ‘IP completion day’ refers to the end of the implementation period. Whilst not defined in the Act, the reference will have the same meaning as in the EUWA. This is by virtue of schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 (as amended) (‘ILRA’). Paragraph 37(c) of schedule 5 of the 2020 Act amends schedule 1 of ILRA to define ‘IP completion day’ by reference to section 39(1) to (5) of that Act.
29. Subsection (1)(a) gives Ministers the power, by regulations, to make provision that would correspond to provision in EU law as it has effect in EU law after the end of the implementation period. Sub-paragraphs (i) to (iv) set out the different types of EU law that provision may be made in relation to, namely EU regulations, EU tertiary legislation, EU decisions and EU directives. These terms are defined in section 12 and refer to the versions applicable in the rest of the EU (as opposed to those which form part of domestic law as retained EU law) and as they have effect in EU law after IP completion day. See paragraphs 71-76 for information on the definitions contained in section 12.
30. There are two aspects to the power in subsection (1)(a). In addition to enabling the Scottish Ministers to make provision corresponding to EU law as it develops after the implementation period (sub-paragraphs (i), (ii) and (iii)), the power also enables Scottish Ministers to make provision in relation to existing EU laws, which have been implemented or have effect domestically already (sub-paragraph (iv)).
31. Subsection (1)(b) mirrors the power in section 2(2)(b) of the ECA. This is the power which can be used to deal with matters ‘arising out of or related to’ EU obligations and permits implementing provision which goes beyond the minimum necessary to implement an EU obligation.
32. Subsection (2) clarifies the extent of Ministers’ ability to adapt provision made under subsection (1)(a)(i), (ii) and (iii) so that it operates effectively in Scots law despite the UK no longer being a member state of the EU. The subsection provides a list of the adaptations that may have to be made by Ministers.

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33. Subsection (3) sets out some of the things that can be done using the power under subsection (1)(a)(i), (ii) and (iii), such as providing for EU functions to be carried out by public authorities in Scotland.
34. Subsection (4) sets out some of the things that can be done using the power under subsection (1)(a)(iv) to amend existing EU law implementation. In such cases where an EU function is already being carried out by a public authority in Scotland, the power will enable that function to be further sub-delegated or conferred on a different public authority.
35. Subsection (5) provides that, where a Scottish public authority has been given a function by virtue of regulations made under subsection (1), the Scottish Ministers may by regulations enable it to charge fees or other charges in connection with carrying out that function. It contains an illustrative list of some of the things that this power may do. In particular it may set the amounts of fees or charges or say how they are to be determined, for example by a formula. It may also provide for how the money is collected and spent. Subsection (5)(c) provides that regulations made under this power can sub-delegate this power to another public authority that has the function.
36. Where regulations do provide for such sub-delegation, the use of this power will be subject to the affirmative procedure by virtue of section 5(2)(e). The exercise of the sub-delegated power will be subject to whatever arrangements for scrutiny are set out in the relevant provisions. Where this power is used to impose a new fee or increase a fee or charge then it is subject to the affirmative procedure by virtue of section 5(2)(c), except where regulations simply alter a fee or charge to reflect changes in the value of money. In those circumstances the regulations will be subject to the negative procedure.
37. Subsection (6) establishes that the power may be used to make any kind of provision that could be made by an Act of the Scottish Parliament. This means, for example, that the power may be used to modify retained EU law in so far as that is otherwise within the scope of the power by virtue of subsection (1) (and subject to any restrictions which may be imposed by section 30A of the Scotland Act (introduced by section 12(2) of the EUWA)).

Section 2 – Purpose of maintaining and advancing standards

38. **Section 2** sets out that the purpose of section 1(1), amongst other things, is to contribute towards maintaining and advancing standards in certain specified areas, namely: environmental protection; animal health and welfare; plant health; equality, non-discrimination and human rights; and social protection. When using the power under section 1(1), the Scottish Ministers must have due regard to this purpose.
39. While section 48 of the Act sets out that the purpose of the Act as a whole is to make provision in connection with UK withdrawal, section 2 specifically relates to the use of the power under section 1(1), effectively providing a steer as to how the power should be used, without removing the discretionary nature of the power, or limiting the use of the power to the areas listed.

Section 3 – Limitations on the section 1(1) power

40. Section 3 sets out limits on the use of the power, which are that it cannot be used to:
 - impose or increase taxation, make retrospective provision or create certain types of criminal offence;
 - provide for the establishment of a Scottish public authority;
 - remove protections relating to judicial independence or make provision contrary to section 1 of the Judiciary and Courts (Scotland) Act 2008;

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- confer on public authorities in Scotland functions that are inconsistent with the general objects and purposes of the authority; or
- modify the Scotland Act 1998 (or the protected subject-matters listed in section 31(5) of that Act), the Equality Act 2006 or the Equality Act 2010. Subsection (2) qualifies the limitation on removal of judicial protection or modification of the Equality Act 2010 if alternative provision is made in the regulations that is equivalent to the protection being removed or modified.

Section 4 – Duration of the section 1(1) power

41. Section 4 provides that the power under section 1(1) expires and is no longer available to the Scottish Ministers six years after it comes into force. The Scottish Ministers may, by regulations subject to the affirmative procedure, extend that period. The power to extend may be exercised more than once but the period may not be extended beyond a maximum of 10 years from the date the power under section 1(1) comes into force.
42. Subsection (5) clarifies that although the power under section 1 expires, the regulations made under the power do not expire.

Section 5 – Scrutiny of regulations under section 1(1)

43. Subsections (1) and (2) set out the circumstances in which regulations made under section 1(1) powers are subject to the affirmative procedure of the Scottish Parliament (affirmative procedure means the regulations cannot be made unless a draft of them has been laid before and approved by the Scottish Parliament). These are when an instrument under section 1(1):
 - abolishes a function of an EU entity or public authority in a member State without providing for an equivalent function to be exercisable by any person, or provides for any function of an EU entity or public authority in a member State to be exercisable instead by a Scottish public authority or (as the case may be) to be conferred instead on another Scottish public authority or person,
 - imposes, or otherwise relates to, a fee or charge in respect of a function exercisable by a Scottish public authority (except where the alteration of the fee reflects changes in the value of money),
 - creates, or widens the scope of, a criminal offence, or
 - creates or amends a power to legislate.
44. Subsection (3) sets out that any instruments made under these powers that do not fall into the categories in subsection (2) are subject to the negative procedure. Negative procedure means the regulations can be made but are subject to subsequent annulment by the Parliament. However, subsection (3) also permits discretion for affirmative procedure to be applied as opposed to negative procedure, meaning that an instrument which would normally be subject to negative procedure could benefit from additional scrutiny by the Parliament where appropriate.

Section 6 – Policy statement on the section 1(1) power

45. Subsection (1) requires that Scottish Ministers must publish a statement of their policy on the approach to be taken, the factors to be taken into account, and the process to be followed when considering whether to use the power under section 1(1). It is for the Scottish Ministers to determine the most appropriate manner of publication.
46. Subsection (2) makes provision for the Scottish Ministers, at their discretion, to revise the policy statement and publish it accordingly.

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47. Subsection (3) provides, with reference to section 9(9), that when the Scottish Ministers have laid an instrument or draft before the Scottish Parliament which contains provision that involves using the power under section 1(1) in a way that is not in accordance with the current published policy statement, then Ministers must review the policy statement and either publish a revised version, or lay a document before the Scottish Parliament explaining why, in their opinion, it is not necessary to revise it.
48. Subsection (5) makes clear that the use of the power under section 1(1) is not dependent on such a policy statement having first been published. This means that the Scottish Ministers can use that power before the policy statement is published.

Section 7 – Procedure for publication of policy statement

49. Section 7 sets out the procedure which must be followed before a policy statement, or revised policy statement is published by Scottish Ministers. It sets out a three stage process.
50. In the first stage, subsection (3) requires that Scottish Ministers must first lay a draft copy of the policy statement before the Scottish Parliament, and have regard to any representations made to them about the draft within 28 days of the draft policy statement being laid before the Scottish Parliament.
51. In the second stage, subsection (1) requires that Scottish Ministers must lay a copy of the statement before the Scottish Parliament for approval. Subsection (4) requires Scottish Ministers at the same time to lay before the Scottish Parliament a document describing how they have had regard to any representations made about the draft document.
52. Subsections (2) and (5) have the effect of allowing the Scottish Parliament a period of 28 days in which it can agree by resolution that the policy statement should not be approved, thereby preventing the Scottish Ministers from publishing it. If the Scottish Parliament makes such a resolution, then the Scottish Ministers will be required to review and revise the policy statement, having regard to any views expressed by the Scottish Parliament and to lay a copy of the revised statement before the Scottish Parliament. Subsection (6) makes clear that in those circumstances, the Scottish Parliament will have another period of 28 days in which to consider the revised statement.
53. In the third stage, following the expiry of 28 days without the Scottish Parliament having resolved that the statement should not be approved, Scottish Ministers are permitted to publish the statement as per the requirement under section 6.
54. Subsection (7) sets out that in calculating the periods of 28 days provided for by subsections 3(b) and (5), no account should be taken of any period during which the Parliament is dissolved or is in recess for more than four days.
55. Subsection (8) has the effect of requiring a first draft policy statement to be laid as soon as reasonably practicable after section 1(1) comes into force.

Sections 8 to 11 – Explanatory statements for, and reporting on, regulations under section 1(1)

56. Sections 8 and 9 require all instruments made, or laid in draft, under section 1(1) to be accompanied by written explanatory statements, setting out certain matters relating to the making of the instrument:
 - An explanation of the instrument and why Scottish Ministers consider there are good reasons for making it, for example to ensure the highest possible food safety standards are maintained, the pre-IP completion day law which is relevant to it, and its effect on retained EU law;

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- An explanation of the effect (if any) which the instrument has on Convention rights and other international human rights;
 - Whether it modifies any provision of equality legislation and if so, what its effect is;
 - That the Scottish Ministers have had regard to their duties under equality legislation;
 - The instrument's effect on rights and duties relating to employment and health and safety, and matters relating to consumer protection (in so far as it would be within devolved competence for an instrument to have an effect on those matters);
 - Whether Scottish Ministers have consulted with local authorities, and others, and if so, the details of that consultation;
 - The likely financial implications of the provision (except where the regulations are subject to negative procedure).
 - An explanation of why, in the Scottish Ministers' opinion, there are good reasons for laying the instrument or draft at that time, or, as the case may be, for using the power in that way, if the instrument or draft:
 - is laid before a policy statement is published under section 6(1);
 - is laid during the period between a revised policy statement being laid for approval and it being published; or
 - contains provision that involves using the power under section 1(1) in a way that is not in accordance with the policy statement published under section 6.
57. Section 8(4) requires the Scottish Ministers, if they fail to make such a statement, to set out the reasons why.
58. Section 8(5) requires the Scottish Ministers to arrange for the publication of these statements.
59. [Section 8\(6\)](#) provides that the Scottish Ministers do not have to comply separately with the requirement to make an explanatory statement if they have previously done so for an equivalent instrument (for example, where a draft has been withdrawn and re-laid with minor modifications).
60. Paragraph 16 of schedule 8 of the EUWA imposes a similar requirement for certain statements to be made (on or after IP completion day) in relation to Scottish statutory instruments (SSIs) which amend or revoke subordinate legislation made under section 2(2) of the ECA. The requirement applies to SSIs or draft instruments to be laid before the Scottish Parliament and it applies whether the SSI is made under powers conferred before, on or after IP completion day but it does not apply to powers under the EUWA itself. The duty falls on the Scottish Ministers or other authority making the instrument. In the event that the Scottish Ministers are required to make an explanatory statement under both section 9 of this Act and under paragraph 16 of schedule 8 of the EUWA, it would be possible for the Scottish Ministers to make a single statement.
61. Section 10(1) requires Scottish Ministers to prepare and lay before the Scottish Parliament a report explaining how the section 1(1) power has been used during the reporting period, and how Scottish Ministers intend to use it over such period of time as they may determine, as well as how those past and future uses contribute, have contributed, or are expected to contribute, to achieving the purpose set out in section 2. It also requires Ministers to set out in that report any use of the power which has been considered during the reporting period.
62. The first reporting period is defined by section 10(2)(a) as the period from the day on which the section 1(1) power comes into force until 31 August 2021. Subsequent

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reporting periods are defined by section 10(2)(b) as each subsequent period of one year. Section 10(2)(c) defines the final reporting period as the period beginning with the day after the end of the last period of one year until the expiry of the section 1(1) power.

63. Section 10(3) makes clear that in relation to the report on the final reporting period, Scottish Ministers are not required to set out how they intend to use the power as per section 10(1)(c), nor how future uses of the power will contribute to the purpose as per section 10(1)(d).
64. Section 11 sets out the procedure which Scottish Ministers must follow before laying the report required by section 10(1). That procedure has two stages.
65. In the first stage, subsection (1) requires that the report must first be laid in draft (as soon as practicable, and no later than two months after the end of the reporting period, as required by subsection (3)), and that in preparing the final report Scottish Ministers must have regard to any representations made to them about the draft during a consultation period (subsection (2) clarifies that this process only relates to the forward-looking aspects of the report, i.e. the aspect where Scottish Ministers explain how they intend to use the power under section 1(1) in the future).
66. That consultation period is defined by subsections (7) and (8) as 28 days from the day on which the draft report is laid, not counting any periods when the Scottish Parliament is dissolved or in recess for more than four days.
67. In the second stage, i.e. the laying of the final report before the Scottish Parliament as required by section 11, subsection (4) provides that this may not be done before the end of the consultation period.
68. Subsection (5) requires that when the report is laid before the Scottish Parliament, a document must also be laid which summarises the representations received on the draft and how regard has been had to these in preparation of the final report.
69. Subsection (6) provides that should representations have been made proposing that primary legislation should instead be used in relation to any particular intended uses of the power, that document must cover those representations separately.
70. Should Scottish Ministers deem it necessary to bring forward regulations either before a report is laid, or which were not foreseen in the most recent report, it is expected that the reasons for doing so will be addressed as part of the explanatory statements required by sections 8 and 9.

Section 12 – Interpretation of Part 1

71. Section 12(1) defines several of the terms in Part 1 of the Act.
72. Subsection (2) makes clear that the power in section 1 does not require Ministers to implement the whole of an EU Directive or make provision corresponding to the whole of an EU Regulation.
73. In terms of the interpretation of provision made under the power in section 1 of the Act, whilst there is no express provision about this on the face of the Act, it is also relevant to note section 6 of the EUWA. Section 6³ makes provision about the relationship between the Court of Justice of the European Union⁴ ('the CJEU') and domestic courts and tribunals at the end of the implementation period.
74. Section 6(1) of the EUWA makes clear that CJEU judgments passed after the end of the implementation period are not binding on domestic courts in the UK. Section 6(2)

³ <http://www.legislation.gov.uk/ukpga/2018/16/section/6>

⁴ The CJEU has jurisdiction to rule on the interpretation and application of the treaties. In particular, the Court has jurisdiction to rule on challenges to the validity of EU acts, in infraction proceedings brought by the Commission against member states and on references from national courts concerning the interpretation of EU acts. The Court is made up of two subcourts: the General Court and the Court of Justice (which is sometimes called the ECJ).

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of the EUWA establishes that, despite section 6(1), domestic courts may have regard to CJEU judgments delivered after the end of the implementation period in so far as any such judgments are relevant to any matter before the court or tribunal. In so far as a court may need to interpret provisions implemented under section 1 of this Act, it is considered likely to be relevant for a court to have regard to any case law of the CJEU interpreting the corresponding EU legislation.

75. Section 6 of the EUWA also makes provision regarding the interpretation and application of retained EU law. As a general proposition, section 6(3) makes clear that UK domestic courts remain bound by judgments of the CJEU and domestic courts passed before IP completion day ('retained EU case law'), albeit the Supreme Court and the High Court of Justiciary in Scotland may choose to depart from such CJEU case law. This aspect of section 6 could potentially be relevant in so far as the power under section 1 is used to modify retained EU law.
76. The 2020 Act introduced amendments to section 6 of the EUWA to confer a new power on UK Ministers to make regulations providing for circumstances in which lower courts (to be specified under the power) may also not be bound by such retained EU case law. The regulations may also set the test that is to apply in deciding whether to depart from such case law. Depending on how the new power in section 6 is utilised, the resulting regulations could potentially have implications for the interpretation of provision made under section 1 of this Act.

Part 2 – Environment

Chapter 1 – Environmental principles

77. The Act confers on the Scottish Ministers functions relating to environmental principles, and creates duties on Scottish Ministers and other bodies. It replaces the effect of these principles on European law and policy in Scottish domestic legislation, in the preparation of environmental policy and development of environmental regulation in Scotland, following EU exit.

Section 13 - The guiding principles on the environment

78. Section 13 of the Act establishes in domestic law guiding principles on the environment which are equivalent to the requirement that environmental protection requirements are integrated into policy and the EU environmental principles established under EU law. The guiding principles listed in subsection (1) are the principle that protecting the environment should be integrated into the making of policies, the precautionary principle as it relates to the environment, the principle that preventative action should be taken, the principle that environmental damage should be rectified at source, and the principle that polluter should pay.
79. EU law contains a requirement that environmental protection requirements must be integrated into the definition and implementation of policies and activities, in particular with a view to promoting sustainable development. The guiding principle of integration in subsection (1)(a) is derived from this requirement. The other guiding principles reflect the four EU environmental principles that underpin the development of EU environmental policy, and are commonly defined as:
 80. Precautionary principle. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation.
 81. Prevention principle. Preventative action should be taken to avoid environmental damage.

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82. Rectification at Source principle. Environmental damage should, as a priority, be rectified at source. Polluter Pays principle. The polluter should bear the cost of pollution control and remediation.
83. Subsections (2) and (3) set out how the guiding principles are derived from the equivalent principles, and integration requirement, provided for in Article 11 of Title II and Article 191(2) of Title XX of the Treaty on the Functioning of the European Union. When the Scottish Ministers prepare guidance under section 17, they are to have regard to the interpretation of those equivalent principles by the CJEU from time to time.
84. Subsections (4) to (7) allow the Scottish Ministers to amend, add, further define or remove environmental principles by regulations. The guiding principles as set out in the Act may be amended, removed or further defined where that is necessary to ensure they continue to correspond to the equivalent EU principles, as they form part of EU law. Any new principle that is introduced in addition to the principles derived from the equivalent principles provided for in Article 11 of Title II and Article 191(2) of Title XX of the Treaty on the Functioning of the European Union may be amended or altered by regulations without limitation. Regulations will be subject to affirmative parliamentary procedure and before laying must have gone through appropriate consultation with persons or bodies as stated within the Act.

Section 14 - Ministers' duties to have due regard to the guiding principles

85. Section 14 of the Act imposes on the Scottish Ministers and Ministers of the Crown, as far as they are acting with respect to Scotland, a duty to have due regard to the guiding environmental principles when developing policies, including proposals for legislation. A Minister of the Crown would be required to consider the guiding environmental principles or to have them in view when developing policy for Scotland. The Scottish Parliament has competence to impose a requirement on both the Scottish Ministers and Ministers of the Crown to have regard to the guiding environmental principles as the conferral has a devolved purpose, environmental protection, and related effect. The duty, when read with section 16, will apply to policy development, including proposals for legislation, with the purpose of contributing to the protection and improvement of the environment and sustainable development. Exempt policy areas of national defence or civil emergency and finance or budgets are listed in subsection (3).

Section 15 - Other authorities' duty to have due regard to the guiding principles

86. Section 15 ensures that the guiding principles have effect on all decisions of public authorities in Scotland, other than reserved bodies (as defined in the Scotland Act 1998), with the potential for significant impacts on the environment. It provides that where these public authorities are responsible authorities in terms of the Environmental Assessment (Scotland) Act 2005, they must have due regard to the principles when doing anything in respect of which the duty under section 1 of that Act applies. That requires responsible authorities to carry out environmental assessments under that Act when preparing certain plans or programmes. Subsection (2) defines "responsible authority" in line with the 2005 Act (see section 2 of that Act), and excludes the effect of this section on the Scottish Ministers and Ministers of the Crown because the duty placed on the Scottish Ministers and Ministers of the Crown by section 14 applies to developing policy, which is wider than the circumstances to which the duty under section 1 of the 2005 Act applies.

Section 16 - Purpose of duties under sections 14 and 15

87. Section 16 sets out that the purpose of the duties established in sections 14 and 15 is to protect and improve the environment and contribute to sustainable development.
88. Subsection (2), read together with subsection (3), provides a definition of the environment for the purposes of subsection (1).

Section 17 - Guidance

89. Section 17 requires the Scottish Ministers to publish guidance on the guiding principles and the duties in sections 14 and 15. Subsection (2) sets out content that may be in the guidance, including provision about the interpretation of the duties, how the principles relate to each other, and how the duties relate to other duties relating to the environment (including the duties under the Environmental Assessment (Scotland) Act 2005). The guidance will support the interpretation and implementation of the principles duty by Scottish Ministers, Ministers of the Crown and responsible authorities. It is intended to set out how the Scottish Ministers and other public bodies can demonstrate their consideration of the guiding principles through the Environmental Assessment process and is intended to provide advice and case studies for policy makers.
90. Subsection (3) places an obligation on persons subject to the duties to have regard to the guiding principles to have regard to the guidance.

Section 18 - Procedure for publication of guidance

91. Section 18 sets out the procedure for preparation of guidance, placing requirements on the Scottish Ministers to consult on the guidance, and to lay it before the Scottish Parliament prior to publication. Subsection (3) sets out the requirement for the Scottish Ministers to consult a Minister of the Crown, relevant public authorities or other appropriate persons who are subject to the principles duty, and other persons as they consider appropriate, prior to laying the guidance. Subsection (4) sets out that the Scottish Ministers must report on the outcome of the consultation when presenting the guidance to the Parliament. Subsections (5) and (6) provide 40 days, not counting periods of recess or dissolution for more than four days, for Parliament to resolve that the guidance should not be published.

Chapter 2 – Environmental governance

92. This Chapter establishes a new Scottish public body, Environmental Standards Scotland, and gives it a range of functions and powers. These powers and functions enable Environmental Standards Scotland to monitor and secure compliance by public authorities in Scotland, other than reserved bodies, with environmental law, and to improve the effectiveness of environmental law and of its implementation and application. It seeks to maintain a system of environmental governance following the UK's exit from the EU, one which is equivalent to that previously provided by the institutions of the EU but adapted as appropriate to function in a domestic context.

Establishment of Environmental Standards Scotland

Section 19 - Environmental Standards Scotland

93. Section 19 provides for the establishment of a new public body called Environmental Standards Scotland, with further provision relating to the structure, membership and governance of the body set out in schedule 1.

Functions of Environmental Standards Scotland

Section 20 - Functions

94. Section 20 sets out the functions of Environmental Standards Scotland.
95. Subsection (1)(a) confers on Environmental Standards Scotland the function of monitoring public authorities' compliance with environmental law and the effectiveness of environmental law and of how it is implemented and applied.
96. Subsection (1)(b) confers on Environmental Standards Scotland the function of investigating any question of whether a public authority is failing (or has failed) to

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comply with environmental law, as well as any question about the effectiveness of environmental law or whether it is (or has been) implemented or applied effectively. Environmental Standards Scotland can investigate on its own initiative or in response to information from another person, who could be, for example, a member of the public, a civic society group, a business or a public body.

97. Subsection (1)(c) allows for Environmental Standards Scotland to take appropriate action to secure a public authority's compliance with environmental law, and to secure improvement in the effectiveness of environmental law or in how it is implemented or applied.
98. Subsection (1)(d) provides that Environmental Standards Scotland has the additional functions conferred on it by this or any other enactment.
99. Subsection (2) provides for a range of supporting functions in exercise of the functions at subsection (1).
100. Subsection (2)(a) and (b) provides for Environmental Standards Scotland to carry out, commission or support any research, as well as seek any independent and expert advice, it considers appropriate. Subsection (2)(c) and (d) also enables Environmental Standards Scotland to make recommendations on any matter relevant to its functions as well as consider, assess and review data on the quality of Scotland's environment.
101. Subsection (2)(e) and (f) provides that Environmental Standards Scotland may also keep under review the implementation of any international obligation of the United Kingdom relating to environmental protection as well as have regard to developments in, and information on, the effectiveness of international environmental protection legislation. ("International environmental protection legislation" is defined, in section 46(1), to mean legislation in countries other than Scotland, and legislation made by international organisations, that is mainly concerned with environmental protection. The European Union is one example of an international organisation with a legislative function). This will allow Environmental Standards Scotland to make comparisons with the effectiveness of environmental law in other countries.
102. Subsection (2)(g) provides for Environmental Standards Scotland to collaborate with any other environmental governance body in the UK (as defined by section 46(1)), including the Office for Environmental Protection (an environmental governance body being established by the Environment Bill⁵), or such other persons as it considers appropriate. Other persons could include relevant international bodies, such as the European Commission. This will allow joint working on policy effectiveness, and sharing of experience and best practice.
103. Subsection (2)(h) allows for Environmental Standards Scotland to request information from public authorities regarding the exercise of their functions under environmental law. This may, for example, be for monitoring or investigatory reasons.
104. Subsection (3) sets out that, when exercising its functions, Environmental Standards Scotland must act objectively, impartially, proportionately and transparently.

Section 21 - Power to modify functions.

105. Section 21 enables the Scottish Ministers, by regulations, to modify the functions of Environmental Standards Scotland in response to requirements set out in agreements on the future relationship between the UK and EU. This will ensure that Scotland is able to achieve and demonstrate compliance with the terms of such agreements without the need for further primary legislation.

⁵ The Environment Bill commenced its Report Stage in the House of Commons on 26 January 2021. Information on the progress of the Bill and a copy of the Bill following its Commons Committee Stage is available on the UK Parliament's website, which can be accessed via this [web link](#).

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106. Subsection (1) sets out the circumstances under which this regulation-making power has effect, that is for the purpose of implementing international obligations arising out of a future agreement or arrangement between the UK and the EU.
107. Subsections (2) to (5) set out further conditions for this regulation-making power, including that the Scottish Ministers are required to consult with Environmental Standards Scotland and any other persons they consider appropriate. Any regulations made under this section are subject to the affirmative procedure.

Section 22 - Duty to prepare and publish strategy on exercise of functions

108. Section 22 places a duty on Environmental Standards Scotland to prepare and publish a strategy on the exercise of its functions, and to exercise its functions in accordance with that strategy. Further provision on the strategy is set out in schedule 2.

Section 23 - Co-operation duties of public authorities and Environmental Standards Scotland

109. Section 23 sets obligations on public authorities to co-operate with Environmental Standards Scotland. This is to ensure that Environmental Standards Scotland is able to carry out its functions, and enable public authorities and Environmental Standards Scotland to resolve matters by agreement wherever possible.
110. Subsection (1) requires public authorities to co-operate and provide reasonable assistance following requests made by Environmental Standards Scotland in connection with the exercise of its functions, including the provision of information.
111. Subsection (2) requires public authorities to make all reasonable efforts to swiftly resolve any matter which Environmental Standards Scotland raises concerning a failure to comply with environmental law, a failure to make effective environmental law or a failure to implement or apply it effectively. Public authorities are further required to make all reasonable efforts to reach agreement with Environmental Standards Scotland on any remedial action needed to be taken by the authority for the purpose of environmental protection.
112. Subsection (3) places a duty on Environmental Standards Scotland to consult the Office for Environmental Protection, or any equivalent environmental governance body in Wales or Northern Ireland, where Environmental Standards Scotland considers that the exercising of its functions may be relevant to the exercise of that body's functions (for example, where a matter has a cross-border impact). The Environment Bill⁶ likewise places a duty on the Office for Environmental Protection to consult devolved environmental governance bodies. The intention is that this duty will be placed symmetrically on all environmental governance bodies in the UK. This duty to consult stands alongside Environmental Standards Scotland's power to collaborate with those bodies as set out in section 20(2)(g).

Information notices

Section 24 - Power to require information

113. Section 24 gives powers to Environmental Standards Scotland to require information from a public authority. It is expected that, in the vast majority of instances, information will be supplied by public authorities under the general co-operation duty at section 23. However, this power enables Environmental Standards Scotland to require the provision of information in the unusual event that a public authority is for some reason not willingly providing it.

⁶ Information on the progress of the Environment Bill and a copy of the Bill following it's Commons Committee Stage is available on the UK Parliament's website, which can be accessed via this [web link](#).

114. Section 24 therefore provides that, for the purpose of fulfilling its functions, Environmental Standards Scotland may issue a written ‘information notice’ to a public authority requiring it to provide such information as Environmental Standards Scotland reasonably requires. Subsection (2) sets out the details to be specified within the information notice. This will allow a formal record to be created between the public authority and Environmental Standards Scotland. Subsection (3) allows Environmental Standards Scotland to withdraw an information notice by writing to the public authority to whom the information notice was issued, for example if it decided that no further investigation of the particular matter was necessary. Subsection (4) defines ‘information’ for the purposes of section 24.

Section 25 - Failure to comply with an information notice

115. Section 25 provides for the enforcement of information notices. It is expected that this step will be taken extremely rarely. However, it is a necessary underpinning of Environmental Standards Scotland’s functions.
116. This section allows Environmental Standards Scotland to report to the Court of Session any case where a public authority fails, without reasonable excuse, to comply with an information notice. Following receipt of such a report, and consideration of any evidence or representations on the matter, the Court may make an order for enforcement or take the matter forward as if it were a contempt of the Court, or both.

Improvement reports and improvement plans

Section 26 - Improvement report

117. Section 26 sets out the power for Environmental Standards Scotland to prepare an improvement report in respect of failures by public authorities to comply with environmental law, to make effective environmental law or to implement or apply environmental law effectively. This power is generally available to Environmental Standards Scotland for addressing matters of genuine strategic importance. The co-operation duty on public authorities at section 23, coupled with the requirement on Environmental Standards Scotland at paragraph 1(1)(g) of schedule 2 to set out how it intends to resolve issues through agreement, are intended to ensure that most matters that come to the attention of Environmental Standards Scotland are resolved without any formal exercise of its powers.
118. The power to prepare an improvement report is one of the three enforcement powers provided to Environmental Standards Scotland with respect to compliance with, and effectiveness of, environmental law. The power to prepare an improvement report should not be used where exercise of the compliance notice power under section 31 would be more effective. This will mean that the compliance notice is used in preference to the improvement report for matters relating to a public authority’s exercise of its regulatory functions (as defined by section 46(1)). Environment Standards Scotland is also given the power to apply for judicial review of a public authority’s conduct or intervene in an existing case, in situations where there are serious failures to comply with the law creating serious environmental harm or risk of harm.
119. Subsection (1) gives Environmental Standards Scotland the power to prepare an improvement report if it considers that a public authority has failed to comply with environmental law, make effective environmental law or implement or apply environmental law effectively when carrying out its functions. Examples could be a strategic failure to take an action required by environmental law, such as banning a practice or substance; that an environmental duty on public bodies generally is specified in such a way that it is not achieving its goals; or that a regulatory regime is being implemented in a way that is ineffective in reaching its goals. The expectation is that improvement reports will be prepared for a broad area of environmental policy, so identified failures could span all number of these examples.

120. Subsection (2) allows Environmental Standards Scotland to prepare an improvement report if the combined effect of two or more public authorities exercising their functions in the same or a similar way constitutes a systemic failure to comply with environmental law, make effective environmental law or implement or apply environmental law effectively. This might, for example, cover the circumstance where many public bodies are failing to implement a duty, or carrying out a function in a way that systemically fails to take account of an aspect of environmental law.
121. Subsection (3) requires Environmental Standards Scotland to be satisfied that any failure arising out of a public authority carrying out its regulatory functions could not be addressed in a more effective manner by issuing a compliance notice under section 31(1).
122. This is to ensure that the compliance notice route is preferred for regulatory practice issues, such as the conditions that a regulator is placing on a class of permit, although it would be covered by subsection (1), leaving the improvement notice power for more strategic issues.
123. Subsection (4) explains what an improvement report is. It is a report that sets out the details of the alleged failure and recommends measures that the public authority should take—
- to comply with environmental law, or
 - to improve the effectiveness of environmental law, or how it is applied.

Section 27 - Restrictions on preparing an improvement report

124. Section 27 provides that Environmental Standards Scotland may not prepare an improvement report in respect of certain failures to comply with environmental law. Firstly, it may not prepare a report in respect of a failure arising out of any decision taken by a public authority in the exercise of its regulatory functions in relation to a particular person or case. Secondly, it may not prepare a report in respect of a failure arising out of particular conduct which has been the subject of a compliance notice that has not been subsequently withdrawn. This would ensure that the same failure was not subject to dual processes. The potential to withdraw the compliance notice and switch to an improvement report process covers the instance where Environmental Standards Scotland subsequently discovers that a failure is more systematic or widespread than it initially considered. For example, it could initially be considered that a public body was wrongly exercising a regulatory function, leading to a compliance notice, and subsequently be discovered that the problem was systematic (for example reflected in guidance and funding decisions), or widespread across public bodies. In that case, Environmental Standards Scotland might decide to withdraw the compliance notice and prepare an improvement report covering the wider, systemic issues.

Section 28 - Content of an improvement report

125. Section 28 sets out the content that an improvement report must contain.
126. Paragraph (a) requires the report to set out the grounds for preparing it. This includes details of the alleged conduct and circumstances that have led Environmental Standards Scotland to consider that a public authority has failed – or that two or more authorities have collectively failed – to comply with environmental law, to make effective environmental law or to implement or apply it effectively.
127. Paragraphs (b) to (d) require the report to set out Environmental Standards Scotland's reasons for reaching its conclusions, including details of the relevant environmental law and any other information which it took into account during its decision-making, as well as the impact of the failure (e.g. any environmental harm or risk of environmental harm, or any missed opportunity to make improvements in environmental quality). It

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must also propose a timescale for the Scottish Ministers or any other public authority to take forward the recommendations.

Section 29 - Improvement report: procedural requirements

128. Section 29 requires Environmental Standards Scotland to send a copy of an improvement report to the Scottish Ministers, to lay a copy before the Scottish Parliament and to publish the report.

Section 30 - Improvement plan

129. Section 30 sets out the obligation and procedure for the Scottish Ministers to prepare an improvement plan in response to Environmental Standards Scotland laying an improvement report before the Scottish Parliament in accordance with section 29.
130. Subsection (1) establishes the requirement on Scottish Ministers to prepare an improvement plan in response to an improvement report. The obligation to prepare an improvement plan always falls on the Scottish Ministers, even if the improvement report concerns a failure that is attributable to another public authority.
131. Subsection (2) provides for the details of the improvement plan, which must include information on what the Scottish Ministers will do in response to the recommendations in the improvement report. This should include, the proposed timescale to implement the recommendations and the arrangements that will be made to review and report on progress in the implementation of the recommendations. However, if the Scottish Ministers do not intend to implement the recommendations in the improvement report (either in full or in part), the reasons for this must be set out in the improvement plan.
132. Subsection (3) states that the Scottish Ministers must lay a copy of the improvement plan before the Scottish Parliament within a set time period from the date the improvement report was laid: six months, or nine months if the Scottish Ministers consider it necessary to consult other persons (or the general public) about the plan.
133. Subsection (4) requires the Scottish Ministers to provide the Parliament with details of any consultation carried out under subsection (3) when laying an improvement plan. The Scottish Ministers must provide a summary of any views expressed in response to the consultation and provide further detail of how any views have been taken into account. A statement must also be provided confirming if no views were expressed or if no account has been taken of views expressed.
134. Subsections (5) and (6) require the Scottish Ministers to review and revise the improvement plan laid before the Parliament under subsection (3) if the Scottish Parliament has within 40 days resolved not to approve the plan. The Scottish Ministers must lay a copy of the revised improvement plan within three months of the date on which the Parliament resolved not to approve the plan. This process of revision and resubmission continues until a plan is accepted by the Parliament.
135. Once the Parliament has approved an improvement plan, subsection (7) requires the Scottish Ministers to publish the plan.
136. Subsection (8) provides that no account is to be taken of any period during which the Parliament is dissolved or in recess for more than 4 days when calculating the 40-day period mentioned in subsection (5).

Compliance notices

Section 31 - Compliance notice

137. Section 31 sets out the circumstances in which Environmental Standards Scotland may issue compliance notices to public authorities. The compliance notice process is designed to remedy failures by public authorities to comply with environmental law

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when exercising their regulatory functions (as defined by section 46(1)). There are two conditions that Environmental Standards Scotland must consider to be met before it may issue a compliance notice. The first condition in subsection (1) is that, in exercising its regulatory functions, a public authority is failing to comply with environmental law, or has failed to comply with environmental law and it is likely that the failure will be repeated or be continued. The second condition in subsection (1) is that the failure has caused, is causing or is at risk of causing environmental harm.

138. Subsection (2) defines a compliance notice as a notice requiring the public authority to whom it is issued to take the steps set out in the notice in order to address its failure to comply with environmental law.

Section 32 - Restrictions on issuing a compliance notice

139. Section 32 provides that Environmental Standards Scotland may not issue a compliance notice in respect of certain failures to comply with environmental law. Firstly, it may not issue a notice in respect of a failure arising out of any decision taken by a public authority in the exercise of its regulatory functions in relation to a particular person or case. This restriction ensures that compliance notices are not used as a means to review individual regulatory decisions or as a substitute appeal process. Secondly, it may not issue a notice in respect of a failure arising out of particular conduct that has already been the subject of an improvement report. This would cover the instance where the failure had already been identified as a systemic issue, either across a range of public bodies, or structurally in the funding or guidance given to the body. Any compliance notice issued in breach of either of these restrictions will not have any effect.

Section 33 - Content of a compliance notice

140. Section 33 sets out the required contents of a compliance notice. It must contain a statement of the grounds for issuing the notice, specifically: the regulatory function of the public authority to which the alleged failure to comply with environmental law relates; the relevant provision of environmental law, and the alleged conduct that has led Environmental Standards Scotland to conclude that the public authority is failing to comply with environmental law or has failed to comply with environmental law and the failure is likely to be repeated or continue. In addition, Environmental Standards Scotland must include in the notice: its reasons for reaching its conclusion; information on the environmental harm or risk of environmental harm being caused, or having been caused, by the alleged failure, and the steps that the public authority must take to address its failure to comply with environmental law.
141. A compliance notice must also contain the following details: the date of issue of the notice; the timescales within which the required steps are to be taken (not less than 28 days from the date on which the notice is issued, meaning that the steps cannot be required to be taken before expiry of the 21-day appeal period specified in section 36(2)(a)); information about the person to whom, and as to how and by when, any representations about the notice may be made; information regarding the right to appeal, including timescales for this as well as an explanation of the consequences of the public authority failing to comply with the requirements of the notice.

Section 34 - Variation of a compliance notice

142. Section 34 makes provision for Environmental Standards Scotland to vary a compliance notice by extending the compliance period referred to in section 33(1)(d). A compliance notice may be varied by Environmental Standards Scotland at any time before expiry of the compliance period by writing to the public authority to whom the compliance notice was issued. The variation of the compliance notice does not affect the date of its issue for the purpose of section 36(2)(a) (which imposes a 21-day time limit on appealing against a compliance notice).

Section 35 - Withdrawal of a compliance notice

143. Section 35 allows for Environmental Standards Scotland to withdraw a compliance notice at any time before completion of the steps that are to be taken to comply with the requirements of the notice by giving notice in writing to that effect to the public authority to whom the compliance notice was issued.

Section 36 - Appeal against a compliance notice

144. Section 36 provides for appeal to a sheriff against a compliance notice. Subsection (1) sets out the grounds for a public authority which has received a compliance notice to appeal against any such notice. A public authority may appeal against a compliance notice on the following grounds: that it has not conducted itself in the manner stated in the notice; that the alleged conduct specified in the notice does not constitute a failure to comply with environmental law or, as the case may be, a failure to comply with environmental law that will likely continue or be repeated, or that the alleged failure is not causing, or has not caused, environmental harm or a risk of environmental harm.
145. Subsection (2) states that an appeal must be made with 21 days of the date of issue of the notice, or it may be made later with the sheriff's permission. Subsection (3) provides for the sheriff to give permission under subsection (2) for an appeal to be made after the expiry of the 21-day period only if the sheriff is satisfied that the public authority has good reason for not making the appeal within the 21-day time limit. Subsection (4) states that the sheriff may cancel the compliance notice or confirm the notice, either with or without modifications. Where an appeal is made under this section, the period set under section 33(1)(d) for compliance with the notice is suspended until the appeal is finally determined or withdrawn. Onward appeals against a sheriff's decision will follow the routes of appeal set out in Part 5 of the Court Reform (Scotland) Act 2014.

Section 37 - Failure to comply with a compliance notice

146. This section provides for Environmental Standards Scotland to report to the Court of Session any case where a public authority fails, without reasonable excuse, to comply with a compliance notice. The Court of Session after receiving a report under this section, and hearing any evidence or representations on the matter, may make such an order for enforcement as it considers appropriate or deal with the matter as if it were a contempt of the Court, or both.

Judicial review and other civil proceedings

Section 38 - Power to apply for judicial review or intervene in civil proceedings

147. Section 38 sets out the circumstances in which Environmental Standards Scotland may apply for judicial review of a public authority's conduct or intervene in an existing case. These powers are expected to be used only rarely. The conditions for this are set out in subsections (1) for an application for judicial review and subsection (4) for intervening in an existing case: essentially where the conduct of the public authority constitutes a serious failure to comply with environmental law and where it is necessary for Environmental Standards Scotland to act to prevent, or mitigate, serious environmental harm. In relation to applications for judicial review, the usual rules and procedure for such court actions will apply, including for example the potential to seek interim orders at the outset if there were considered a need to prevent imminent and serious environmental harm pending the outcome of the judicial review and the requirement to obtain permission from the Court of Session for the judicial review to proceed to be fully considered by it.
148. Subsection (1) allows Environmental Standards Scotland to make an application for judicial review in relation to the conduct of a public authority if Environmental Standards Scotland considers that the conduct constitutes a serious failure to comply with environmental law, and that it is necessary to make an application to prevent or

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mitigate serious environmental harm. This application may be made regardless of a compliance notice or improvement notice being issued to the public authority regarding the same matter.

149. Subsections (2) to (4) provide for Environmental Standards Scotland to intervene, with the court's permission or at its invitation, in existing civil proceedings relating to an alleged failure by a public authority to comply with environmental law. Subsection (4) places similar limits on this power, based on the serious nature of the failure and the serious effect on the environment, as apply in relation to the power under subsection (1). Subsection (5) permits the court to give permission to, or invite, Environmental Standards Scotland to intervene under subsection (3) only if it is satisfied that the intervention is likely to assist the court.
150. Subsection (6) provides for Environmental Standards Scotland to be treated as having sufficient interest in the subject matter of any application which it may make or of any legal proceedings in which it may intervene.
151. Subsection (7) defines "court" and "legal proceedings" for the purposes of this section.

Disclosure of information

Section 39 - Disclosure of information to Environmental Standards Scotland

152. Section 39 ensures that public authorities are able to make appropriate disclosures to Environmental Standards Scotland.
153. Subsection (1) states that no statutory or common law prohibition or restriction on the disclosure of information prevents a public authority from providing Environmental Standards Scotland with information necessary for the exercise of its functions, in accordance with the authority's duty to co-operate under section 23(1) or an information notice issued under section 24(1).
154. However, subsection (2) sets out that a public authority is not required to provide information in certain circumstances. Firstly, where it would be entitled to refuse to provide it in civil proceedings on grounds of confidentiality of communications. Secondly, where it would be entitled (or required by common law) to refuse to provide it in civil proceedings on grounds of public interest immunity. In addition, subsection (3) (as read with subsection (4)) states that nothing in this Chapter requires or authorises disclosure of information which would contravene data protection legislation as defined by section 3(9) of the Data Protection Act 2018.

Section 40 - Confidentiality of proceedings

155. Section 40 provides for the confidentiality of information obtained under the duty of cooperation or information notice power, and correspondence relating to ongoing proceedings, where Environmental Standards Scotland is considering further action.
156. Subsection (1) prohibits Environmental Standards Scotland disclosing information or correspondence that relates to ongoing proceedings, subject to certain exceptions set out in subsection (2). Environmental Standards Scotland may disclose information it has obtained where the disclosure is made: with the consent of the public authority who provided the information or correspondence (although this does not apply to disclosure of an information notice, a compliance notice or an unpublished draft of an improvement report); for purposes connected with the performance of its functions; to the Office for Environmental Protection, or any other environmental governance body, for purposes connected with the exercise of an environmental governance function; in respect of information, or correspondence, that relates only to a matter in relation to which Environmental Standards Scotland does not intend to take any further action; for the purposes of civil proceedings; for the purposes of the investigation or prosecution of any offence or suspected offence or for the purposes of the prevention or detection

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of crime; in pursuance of an order of a court or tribunal; in accordance with any other enactment requiring or permitting the disclosure.

Duty to consult on effectiveness of governance arrangements

Section 41 - Duty to consult on effectiveness of governance arrangements

157. Section 41 provides that the Scottish Ministers must prepare and consult on a report on the effectiveness of governance arrangements established under this Chapter.
158. Subsection (2) sets out the matters which must be contained in the report. The matters which must be included are whether the provisions set out in this Chapter have ensured that there continues to be effective and appropriate environmental governance following the withdrawal of the UK from the EU, whether the law in Scotland on access to justice on environmental matters is effective and sufficient, and whether and, if so, how the establishment of an environmental court could enhance these governance arrangements.
159. Subsection (3) provides a list of the persons with whom the Scottish Ministers are required to consult in relation to the report. These persons are Environmental Standards Scotland, persons who appear to the Scottish Ministers to be representative of the interests of persons likely to be affected by the governance arrangements, and such other persons as the Scottish Ministers consider appropriate.
160. Subsection (4) requires that the consultation on the report must commence before the end of the period of six months beginning with the date on which Environmental Standards Scotland publishes its strategy (as required by section 22(1)). Subsection (5) requires the Scottish Ministers to lay a copy of the consultation document before the Parliament as soon reasonably practicable after the consultation commences.
161. Following the conclusion of consultation process, subsection (6) requires the Scottish Ministers to lay before Parliament a statement setting out details of the consultation that was carried out, a summary of any views expressed in response to the consultation, and the Scottish Ministers' recommendations in response to those views.

Interpretation of Chapter 2

Section 42 - Meaning of "public authority"

162. Section 42 sets out the meaning of "public authority" for the purposes of this Chapter, which determines the public authorities in relation to whom Environmental Standards Scotland has functions under section 20(1). It means a person exercising any function of a public nature, but it excludes Environmental Standards Scotland itself, courts and tribunals, the Scottish and UK Parliaments, UK Government Ministers, bodies to which paragraph 3 (reserved bodies) of Part III of schedule 5 of the Scotland Act 1998 applies, and persons exercising functions in connection with proceedings in the Scottish or UK Parliament.

Section 43 - Meaning of "failing to comply with environmental law"

163. Section 43 defines the references to a public authority "failing to comply with environmental law" for the purposes of this Chapter. They are references to a public authority failing to comply with environmental law in any of the following ways: by failing to take proper account of environmental law when carrying out its functions; by carrying out its functions in a way that is contrary to, or incompatible with, environmental law, or by omitting to carry out its functions where the omission is contrary to, or incompatible with, environmental law.

Section 44 - Meaning of “environmental law” and “effectiveness of environmental law”

164. Section 44 provides definitions of “environmental law” and “effectiveness of environmental law” for the purposes of this Chapter.
165. Subsection (1) defines “environmental law” as any legislative provision that is mainly concerned with environmental protection and is not concerned with an excluded matter. Subsection (2) sets out excluded matters. Subsection (3) sets out the meaning of “legislative provision” as provision contained in, or in an instrument made under, an Act of the Scottish Parliament, and provision contained in any other enactment that would be within the legislative competence of the Scottish Parliament.
166. Subsection (4) to (6) provide for the Scottish Ministers to make regulations to set out that a legislative provision is, or is not, within the definition of “environmental law”. Regulations under subsection (4) are subject to the affirmative procedure. The Scottish Ministers must consult Environmental Standards Scotland, and any other persons they consider appropriate, before laying a draft of such regulations before the Scottish Parliament for approval.
167. Subsection (7) defines “effectiveness of environmental law” and “effective environmental law” in terms of the law’s effectiveness in achieving its intended effect by reference to its contribution to environmental protection as well as to improving the health and wellbeing of Scotland’s people, and achieving sustainable economic growth, so far as consistent with environmental protection, and also its effectiveness in contributing to the implementation of any international obligation of the United Kingdom relating to environmental protection.

Section 45 - Meaning of “environmental protection”, “environmental harm” and “the environment”

168. Section 45 provides meanings for “environmental protection” at subsection (1), “environmental harm” at subsection (2) and “the environment” at subsection (3). Subsection (4) defines “human activities” for the purposes of the definition of environmental protection. These definitions are more developed than is generally the case in legislation that uses these terms, and are primarily required to ensure that there is clarity about the scope of the law that is within the purview of Environmental Standards Scotland.

Section 46 - Interpretation of Chapter 2: general

169. This section defines various terms and expressions used throughout Chapter 2 of Part 2 of the Act.

Chapter 3 – Environmental policy strategy

Section 47 - Environmental policy strategy

170. Section 47 requires Scottish Ministers to prepare and publish an environmental policy strategy. Subsection (2) sets out the matters which must be included within the strategy. These are objectives for protecting and improving the environment, policies and proposals for achieving the objectives (or a summary or indication of such policies and proposals) and the arrangements for monitoring progress towards achieving the objectives.
171. Subsection (3) requires that, when preparing the strategy, Scottish Ministers must have regard to the desirability of securing environmental policy which aims at a high level of environmental protection, contributes to sustainable development, contributes to improving the health and wellbeing of Scotland’s people, contributes to objectives in policy areas other than environmental policy, integrates environmental policy

objectives into the development of policies in other areas, and responds to global crises in relation to climate change and biodiversity.

172. Subsections (4) and (5) specify that the strategy may consist of one or more documents, which can include designated documents prepared before this provision was enacted or came into force. Scottish Ministers are permitted to designate one or more documents as forming the whole, or part of, the strategy. This approach will permit Scottish Ministers to bring together existing and planned strategies and plans covering topics such as climate change, the circular economy, waste, air and water quality to produce the strategy.
173. Subsection (6) requires that Scottish Ministers, when preparing the strategy, or any document which forms part of the strategy (and before designating any documents as forming all, or part of, the strategy) to consult such persons as Scottish Ministers consider likely to be affected by the proposals in the strategy or document, any persons which they consider have appropriate expertise or experience in relation to the matters covered by the strategy or document and any other such persons as Scottish Ministers consider appropriate. Subsection (7) allows for consultation carried out prior to this provision coming into effect to satisfy the requirement at subsection (6). Subsection (8) provides that before publication, the Scottish Ministers must lay a copy of the strategy, or any document forming part of it, before the Parliament, together with a statement setting out the details of the consultation on the strategy or document carried out under subsection (6), a summary of the views expressed in response to the consultation, and either details of how regard has been had to the views expressed, if any, in the preparation of the final strategy or document or a statement that no representations were received or that no account has been taken of the views expressed.
174. Subsection (9) places an obligation on Scottish Ministers to review the strategy from time to time, and enables them to revise the strategy, or any document forming part of it. Subsection (10) specifies that the requirements set out in subsections (3), (6) and (8) apply to the preparation and publication of any revised strategy, or document forming part of it.
175. Subsection (11) places an obligation on Scottish Ministers to have due regard to the strategy when making policies (including proposals for legislation).
176. Subsections (12) requires Scottish Ministers to lay a report before the Parliament containing an explanation of progress towards preparation of the strategy. The report requires to be laid before the end of each of the reporting periods specified in subsection (13) (which are one year after the coming into force of this section, and every year thereafter).
177. Subsection (14) specifies that the duty placed on Scottish Ministers under subsection (12) ceases to apply once a copy of the strategy (or any document forming part of it) has been laid before the Scottish Parliament in accordance with subsection (8), so long as consultation on the strategy (or any document forming part of it) has been carried out in accordance with subsection (6) after this section comes into force. This means that the annual reporting obligation will cease once a new strategy document has been prepared and presented to the Parliament under the provisions of this section.
178. Subsection (15) provides definitions of “the environment”, “environmental protection” and “making policies” for the purposes of this provision.

Part 3 - General

Section 48 – Purpose and effect of this Act

179. Subsection (1) sets out that the purpose of the Act is to make provision in connection with the withdrawal of the United Kingdom from the EU.

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180. Subsections (2) to (4) were included to cater for the possibility that the Bill might be enacted before the time that EU law ceased to have effect in Scots law by virtue of EUWA and therefore at a time when section 29(2)(d) of the Scotland Act 1998 would rendered it outside legislative competence to enact provisions that would be incompatible with EU law. However, as at the end of the implementation period on 31 December 2020, EU law has ceased to have effect in Scots law. Therefore subsections (2) to (4) are effectively spent.
181. Subsection (2) would have prevented the Act, or any provision made under it, from having effect in law, so far as it would be incompatible with EU law, before any relevant EU law ceased to have effect in Scotland. Should it have been necessary, it would have postponed the effect of any provision contained in or made under the Act that would have been incompatible with EU law before the provisions of EU law giving rise to the potential incompatibility ceased to have effect as a consequence of UK withdrawal.
182. Subsection (3) took account of the possibility that different provisions of EU law might have ceased to apply on different days and that the anticipated date of the end of the implementation period could have changed.
183. Subsection (4) defines EU law for the purposes of this section.

Section 49 – Regulations: supplementary

184. Subsection (1) provides that any power conferred by the Act (apart from commencement powers in section 51) includes the authority to make different provision for different purposes. It also allows the making of incidental, supplementary, consequential, transitional, transitory or saving provision.

Section 50 – Ancillary provision

185. This section enables the Scottish Ministers, by regulations, to make incidental, supplementary, consequential, transitional, transitory or saving provision in connection with this legislation. Should such regulations be used to textually amend primary legislation they will be subject to affirmative procedure. Otherwise they will be subject to negative procedure.

Section 51 – Commencement

186. This section provides that, other than Part 3 of the Act which comes into force the day after Royal Assent, the Scottish Ministers will specify the day on which the provisions in this Act come into force through regulations.

Section 52 – Repeal of Part 1 of this Act

187. This section allows for the Scottish Ministers to repeal Part 1 of the Act by regulations.

Section 53 – Short title

188. This section provides that the short title of the Act is the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021.

Schedule 1 - Environmental Standards Scotland

Independence from Ministers

189. Paragraph 1 sets out the separation and independence of the functions of Environmental Standards Scotland from the Scottish Government.

Members

190. Paragraph 2 provides for Scottish Ministers to appoint a Chair to Environmental Standards Scotland, with a further 4 to 6 appointments of ordinary members. Appointments are subject to approval by the Scottish Parliament. When making appointments, Scottish Ministers must have regard to the desirability of ensuring that the membership, as a whole, has expertise and experience in law (including international law) relating to the natural environment, environmental science, environmental policy, and, investigatory and enforcement proceedings. Appointments may not be held by an individual for more than a 4-year period. However, a member of Environmental Standards Scotland may be reappointed if the individual is a member at the time of reappointment or, has ceased to be a member not more than three months before the date of reappointment. Members of Environmental Standards Scotland may only be reappointed once.
191. Scottish Ministers may apply further terms and conditions of membership as appropriate, and regulations may be made, subject to the negative procedure, to amend the number of members that can be appointed.
192. Paragraph 3 sets out a list of types of persons that cannot be appointed as a member of Environmental Standards Scotland because of the roles they hold. It also sets out exclusions for insolvent or disqualified persons.
193. Paragraph 4 allows for Environmental Standards Scotland, with the approval of the Scottish Ministers, to pay its members and the members of any committee established by it. This includes expenses incurred by members carrying out their functions.
194. Paragraph 5 establishes that membership of Environmental Standards Scotland ends if: the member provides written notice to the Scottish Ministers and Presiding Officer of the Scottish Parliament that the member resigns; the individual becomes disqualified from being a member for the reasons set out in paragraph 3, or the Scottish Ministers provide written notice informing a member they are to be removed. Where Scottish Ministers propose to give a member (excluding the Chair) notice under subparagraph (1)(c) that they are to be removed from being a member, the Scottish Ministers must consult the Chair of Environmental Standards Scotland. The Scottish Ministers may only remove a member with approval from the Scottish Parliament.

Chief executive and other staff

195. Paragraph 6 establishes a Chief Executive for Environmental Standards Scotland. The Chief Executive may not be an appointed member of Environmental Standards Scotland. In the first instance, the Chief Executive will be appointed by the Scottish Ministers, with approval from the Scottish Parliament. All subsequent appointments will be made by Environmental Standards Scotland itself. Environmental Standards Scotland may also appoint its own staff alongside its Chief Executive. The terms and conditions of these appointments will be determined by Environmental Standards Scotland, subject to the approval of the Scottish Ministers.

Committees and functions

196. Paragraph 7 allows Environmental Standards Scotland to establish committees, whose membership may include (but may not consist entirely of) persons who are not members of Environmental Standards Scotland. However, those persons are not entitled to vote at meetings of the committee.
197. Paragraph 8 provides that Environmental Standards Scotland may authorise any of its members, any committee it has established, its Chief executive or any other member of its staff to perform its functions. This does not affect Environmental Standards Scotland's responsibility for performance of the function or prevent Environmental Standards Scotland from carrying out the function itself.

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198. Paragraph 9 sets out that Environmental Standards Scotland may regulate its own procedure and that of any committee.
199. Paragraph 10 provides that a vacancy in membership, a defect in the appointment of a member or the disqualification of a person from being a member after appointment, does not affect the validity of actions taken by Environmental Standards Scotland or its committees.
200. Paragraph 11 states that Environmental Standards Scotland may do anything which appears to it to be necessary or expedient for the purposes of, or in connection with, the performance of its functions, or to be otherwise conducive to the performance of its functions.

Annual report

201. Paragraph 12 states that Environmental Standards Scotland must prepare and publish a report of its activities on an annual basis. This must be sent to Scottish Ministers, with a copy also laid before the Scottish Parliament. Environmental Standards Scotland may determine the form and content of the annual report.

Resources

202. Paragraph 13 states that the Scottish Ministers must seek to ensure that the amount of resources allocated for use by Environmental Standards Scotland is reasonably sufficient to enable it to perform its functions. Environmental Standards Scotland must include an assessment, in each report prepared under paragraph 12, of whether the amount of resources allocated for use by it in the financial year to which the report relates was sufficient to enable it to perform its functions.

Initial members: transitional provision

203. Paragraph 14 allows for a body to be established before the commencement date (which is the day on which section 19 (establishing Environmental Standards Scotland) comes into force). It will be known as the “non-statutory Environmental Standards body”. This provision is subject to the Scottish Parliament (by resolution) endorsing the establishment of the body by that name, and approving the appointment of the persons nominated to be its chair and other members⁷. This paragraph also appoints the Chair of the non-statutory Environmental Standards body immediately before commencement date as the member to chair Environmental Standards Scotland.
204. Ordinary members of the non-statutory Environmental Standards body immediately before the commencement date are taken to be appointed as members of Environmental Standards Scotland. Appointment periods for initial members will continue to be the same as that for which they had been appointed as members of the non-statutory Environmental Standards body. Therefore, their appointment as a member expires at the time at which the period of their appointment as a member of the non-statutory Environmental Standards body would have expired.
205. Unless exceptions are agreed between the Scottish Ministers and an initial member, the other terms of a member’s appointment will continue to be the same terms as those on which the member had been appointed as a member of the non-statutory Environmental Standards body, so far as consistent with the Act.

Application of legislation relating to public bodies

206. Paragraph 15 applies certain legislation relating to public bodies to Environmental Standards Scotland.

⁷ A motion to this effect was passed by the Scottish Parliament on 23 December 2020, available via this [web link](#).

Schedule 2 - Environmental Standards Scotland: Strategy

207. This schedule sets out provisions for the content and preparation of the strategy that Environmental Standards Scotland is required to prepare and publish under section 22(1).

Content

208. Paragraph 1 provides that the strategy prepared under section 22(1) must set out how Environmental Standards Scotland intends to perform certain functions, including at sub-paragraph (1) how it intends to: monitor public authorities' compliance with environmental law and the effectiveness of environmental law and of its implementation and application; provide for members of the public, non-governmental organisations and others to make representations to it and keep them informed about any action it takes in relation to those representations; exercise its functions so as not to overlap with other statutory or administrative complaints regimes, or the exercise of functions by the Scottish Public Services Ombudsman, the Commissioner for Ethical Standards in Public Life in Scotland, the Scottish Information Commissioner, Audit Scotland or the Committee on Climate Change, or the exercise of functions by any committee of the Scottish Parliament appointed to consider matters relating to environmental law.
209. The strategy must also set out information on how Environmental Standards Scotland will decide whether to investigate possible failures by a public authority to comply with environmental law or the effectiveness of environmental law, as well as how it will carry out and prioritise investigations.
210. In addition, the strategy must set out how Environmental Standards Scotland will engage with public authorities with a view to swiftly resolving matters without recourse to formal powers, seeking to secure agreement to remedial action and improvements in the environment. The strategy must also set out how it will identify and recommend measures to improve the effectiveness of environmental law.
211. Sub-paragraph (2) states that the strategy must also set out the general factors that Environmental Standards Scotland will consider before exercising its functions, and how it will take account of information and form key judgments in the exercise of particular functions, including how it will determine what constitutes a systemic failure and how it will decide whether use of a compliance notice or an improvement report would be more effective. The strategy must also include any other information that Environmental Standards Scotland considers appropriate.

Procedure for publication of strategy

212. Paragraph 2 sets out the procedure for publishing the strategy. In particular, it provides that Environmental Standards Scotland must consult on its strategy, and present it to the Scottish Parliament for approval, alongside a report on the consultation.
213. If, within 40 days of it being laid, the Scottish Parliament resolves not to approve the strategy, Environmental Standards Scotland must review and revise the strategy and resubmit it to Parliament within three months. This process will repeat until a strategy is approved.

Publication of first strategy and interim strategy

214. Paragraph 3 states that Environmental Standards Scotland must lay its first strategy before the Scottish Parliament within the first year of its establishment. Environmental Standards Scotland may publish an interim strategy, covering the information set out at paragraph 1. Although, the publication of an interim strategy is not subject to the procedure specified in paragraph 2.

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Review of strategy

215. Paragraph 4 provides for review and revision of the strategy.